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# INDIGENOUS ETHICS AND ALIEN LAWS: NATIVE TRADITIONS AND THE UNITED STATES LEGAL SYSTEM

Mark A. Michaels

NATIVE American attorneys who maintain a traditional orientation face a set of ethical dilemmas that arise from living in two worlds, from their very participation in a legal system that has operated most often as an instrument of conquest, colonization, and dispossession. The non-Native attorney who works with or on behalf of traditional people faces similar issues, regardless of cultural or religious background, but also must be prepared to proceed cautiously, respectfully, and without paternalism in working as an advocate.<sup>1</sup> For the most part, these issues do not arise in the counseling of individual clients because traditional Native religions tend not to be legalistic or doctrinal in nature. Instead, Native religious traditions generally stress responsibility for and accountability to one's community and one's elders and do not impose "an external ethical system";<sup>2</sup> they emphasize ceremony rather than faith, the relatedness of all creation, and the sacredness of certain places. The challenge for Native Ameri-

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2. Vine Deloria, Jr., *God is Red: A Native View of Religion* 249 (2d ed. 1992). Haudenosaunee (Iroquois) tradition holds that:

Our leaders were instructed to be men with vision and to make every decision on behalf of the seventh generation to come, to have compassion and love for those generations yet unborn. We were instructed to give thanks for all that sustains us. Thus we created great ceremonies of thanksgiving for the life-giving forces of the natural world—with the understanding that *as long as we carried out our ceremonies, life would continue.*

Chief Oren Lyons, in *Voice of Indigenous Peoples: Native People Address the United Nations* 33 (Alexander Ewen ed., 1994) (emphasis added) [hereinafter *Voice of Indigenous People*]. Note that in Haudenosaunee society, these male leaders are chosen by the Clanmothers who are also empowered to remove them from office. In the European tradition, sacred places are most often places of historical significance, whereas for native people sacred places are most often those which are inherently spiritual. See, for example, Chief Oren Lyons's discussion of Mt. Graham, an Apache sacred site. *Id.* at 34.

can lawyers, particularly those who dwell in urban areas, lies in maintaining this sense of accountability, relatedness, and spiritual connection with the land while operating in a system that is based on an antithetical world view.

Native Americans come from a plethora of cultural, religious, and linguistic traditions, and it is somewhat presumptuous to discuss these traditions in sweeping and general terms. Moreover, many modern Indians have been deprived of their traditions; some Indians may be totally assimilated into Euro-American society, while others may belong to a community that identifies itself as Native but retains only the most tenuous links to its past. In South and Central America, the peasant classes are overwhelmingly Indian, but the extent to which traditions and communities have survived varies dramatically.<sup>3</sup> Nevertheless, all Indians in the Americas—whether Atheist, Christian, Mormon, Jew, Moslem, member of the Native American Church, Traditionalist, mixed or full-blooded—share a historical experience that is fundamentally the same, and it is with that historical experience, above all else, that the American Indian lawyer must contend.<sup>4</sup>

The "Indian," later the "Native American," came into being in 1492, when a disoriented Genovese mariner landed on the shores of Hispaniola and encountered members of the Arawak Nation whom he dubbed "Indians" in the mistaken belief that he had landed on an island off the coast of Asia. The misnomer was soon applied to all the

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3. Some would argue that any community that identifies itself as Indian has retained some level of connectedness with tradition. Until the passage of the Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-1963 (1994)), and particularly during the 1950s, however, many Indian children were removed from their communities and adopted by white families. *Id.* § 1901(4).

4. The question of what makes a person an "Indian" is an extremely complex one, both as a matter of law and of cultural identification. For Federal government purposes, one is recognized as Indian if one has an Indian grandparent. *See, e.g.*, 25 U.S.C. § 2007(f)(1) (1994) (applying this blood quantum to educational grantmaking). Notwithstanding this federal provision, certain nations, such as the Mashantucket Pequot, allow individuals with less than 1/16 Indian ancestry to enroll. Elizabeth Abbott, *Narragansetts Scrutinize Membership Claims*, Providence Journal-Bulletin, Jan. 23, 1997, at 1B, available in LEXIS, News Library, Papers File. The Cherokee Nation of Oklahoma has no minimum blood quantum. Lenore A. Stiffarm & Phil Lane, Jr., *The Demography of Native North America: A Question of American Indian Survival*, in *The State of Native America: Genocide, Colonization, and Resistance* 23, 45-46 (M. Annette Jaimes ed., 1992) [hereinafter *The State of Native America*] (quoting Russell Thornton, *American Indian Holocaust and Survival: A Population History Since 1492*, at 199-200 (1987) (citing Albert L. Wahrhaftig & Robert K. Thomas, *Renaissance and Repression: The Oklahoma Cherokee*, Transaction, Nov. 6, 1969, at 42-48)). The Onondaga Nation recognizes membership through the mother's line, in keeping with tradition, and limits enrollment to those of 50% Native ancestry. While it is undisputed that the Indian population of North America has been growing since 1930, it seems that some of this population growth is a consequence of an increasing number of individuals who identify themselves as Indian. *See, e.g., id.* (noting growth of Cherokee Nation of Oklahoma, from 12,000 to over 64,000 in approximately a decade).

Indigenous inhabitants of the Americas, and the previously unimagined concept of race was introduced into this hemisphere. Before European contact, most, if not all, of the inhabitants of this hemisphere identified themselves as "the people" or some variant thereof. It was only after lengthy contact with Europeans that the Native peoples of the Americas began to develop the consciousness of themselves as "Indians" that made efforts at armed, pan-Indian resistance to European conquest a possibility.<sup>5</sup>

Certain eighteenth and nineteenth-century Native religious movements, such as the one led by the Delaware Prophet or the Ghost Dance, were imbued with a pan-Indian spirit that advocated and prayed for a return to old ways and the expulsion of Europeans.<sup>6</sup> While some anthropologists and historians have described these movements as "new" religions, it is probably more accurate to see them as adaptations to changing circumstances within a traditional framework.<sup>7</sup> Ceremonial practices, such as the Sun Dance and the

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5. In North America, at least, this "Indian" identity was often cultural rather than racial. Substantial numbers of European-Americans and African-Americans became culturally Indian, and in some instances rose to leadership positions. For a discussion of this phenomenon, see James Axtell, *The Invasion Within: The Contest of Cultures in Colonial North America* 302-27 (1985). For a detailed study of one such cultural conversion, see John Demos, *The Unredeemed Captive: A Family Story from Early America* (1994).

6. For a discussion of eighteenth-century efforts to establish a pan-Indian, united front, particularly against the nascent United States, and the spiritual dimensions thereof, see Gregory Evans Dowd, *A Spirited Resistance: The North American Indian Struggle for Unity, 1745-1815* (1992). For a firsthand account of the Ghost Dance movement from the perspective of a Christianized Indian who later renounced Christianity, see Luther Standing Bear, *My People the Sioux* 217-30 (1928). Not all such movements were pan-Indian. Handsome Lake, a late eighteenth-century Iroquois prophet, inspired a revival of Iroquois traditionalism that was essentially nationalist rather than pan-Indian. Although white scholars have been eager to find Christian influences on Handsome Lake, it is important to note that the cultural specificity of the Iroquois revival was deeply traditional, as were many, if not most, of its elements. The standard scholarly text on this subject is Anthony F.C. Wallace, *The Death and Rebirth of the Seneca* (1969). Wallace stresses the Christian influences on Handsome Lake and calls his movement a "new religion." *Id.* at 18. Wallace was trained as an anthropologist and his earlier writings betray certain cultural biases linked with that profession. In one instance, he described Tuscarora informants who were less than fully cooperative as being mired in the oral stage of development. See Anthony F.C. Wallace, *Some Psychological Determinants of Culture Change in an Iroquoian Community*, in *Symposium on Local Diversity in Iroquois Culture*, Smithsonian Institution Bureau of American Ethnology Bulletin, no. 149. (William N. Fenton ed., 1949) [hereinafter *Symposium on Local Diversity in Iroquois Culture*]; Anthony F.C. Wallace, *The Modal Personality Structure of the Tuscarora Indians as Revealed by the Rorschach Test*, in *Symposium on Local Diversity in Iroquois Culture*, *supra*. The Haudenosaunee perspective on this issue is dramatically different. Handsome Lake is seen as a prophet who brought a message for "how to deal with the whiskey and with gambling, how to deal with the Bible and with the missionaries." Oren Lyons, *Our Mother Earth*, in *I Become Part of It: Sacred Dimensions in Native American Life* 270, 271 (D.M. Dooling & Paul Jordan-Smith eds., 1989).

7. Standing Bear described the Ghost Dance movement as a religion. Standing Bear, *supra* note 6, at 217. There is nothing in his account, however, to suggest that it

Ghost Dance, often spread from nation to nation in a way that did not destabilize the existing cosmology, so pan-Indian religious movements did not engender pan-Indian religions. Comanche Chief Quanah Parker's establishment of the Native American Church, which was recognized by the State of Oklahoma in 1908 and formally chartered there in 1918, marked the first attempt to develop a truly pan-Indian religious organization.<sup>8</sup> Nevertheless, some members of the Native American Church continue to practice their traditional religions simultaneously.<sup>9</sup>

Even today, many Euro-Americans fail to recognize the vast diversity among American Indian religions and cultures. This stereotyping is perhaps most crudely expressed in cinematic representations that have most often depicted Indians as horseback riding, tipi-dwellers.<sup>10</sup> In recent years, adherents of the New Age movement have embraced native spirituality and religious practices with indifference to the cultural specificity of these traditions and practices. Anthropologists have also perpetuated simplistic notions about Native cultures and religions by implying that a single Indian religion exists.<sup>11</sup> Because most Euro-Americans often fail to recognize both the inaccuracy and the pernicious nature of such stereotypes, it is important to provide a brief overview of the state of Native America prior to contact with Europe and the history of Native religions in the post-contact period.

Before Columbus landed, an estimated 18,000,000 Indigenous people inhabited mainland North America north of Mexico and perhaps as many as 145,000,000 inhabited the hemisphere as a whole.<sup>12</sup> These Indigenous peoples spoke over 1,500 different languages, participated

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was a religion in the sense that it would replace existing religious practices. Indeed, the essence of the Ghost Dance movement was its call for a return to the pre-contact way of life.

8. Jack Utter, *American Indians: Answers to Today's Questions* 92 (1993).

9. See Mary Crow Dog & Richard Erdoes, *Lakota Woman* 95-99 (1990). Crow Dog remarks that such divided loyalties are the source of controversy, at least among the Lakota people.

10. Ironically, the Plains culture that has become so emblematic only developed after the Spanish introduced horses into the Americas.

11. See, e.g., Ruth M. Underhill, *Red Man's Religion: Beliefs and Practices of the Indians North of Mexico* (1965). Underhill clearly had a more nuanced understanding of Indian religions, but her title, as well as some of her arguments, reinforce the stereotype of a monolithic Indian religion.

12. David E. Stannard, *American Holocaust: Columbus and the Conquest of the New World* 11, 33 (1992). These estimates represent the high end of the scale, and there is considerable controversy with respect to the numbers. According to a recent survey of demographic estimates, the most conservative estimate that has significant credibility among contemporary scholars places the North American population at 2,171,125. Russell Thornton, *American Indian Holocaust and Survival: A Population History Since 1492*, at 29 tbl.2-7 (1987) (citing Douglas H. Ubelaker, *Prehistoric New World Population Size: Historical Review and Current Appraisal of North American Estimates*, 45 *Am. J. Physical Anthropology* 664 (1976)). The lowest recent (since 1960) estimate for the hemisphere is 30,000,000. *Id.* at 23 tbl.2-1. The survey's author, demographer Russell Thornton, takes a middle position estimating the North Ameri-

in an array of different legal and political systems and practiced many different religions.<sup>13</sup> Beginning in 1492, all Indigenous societies began to experience severe disruptions due to contact with Europeans. Disruption, and even extinction, occurred in uncontacted nations due to the introduction and spread of alien microorganisms. The first known smallpox epidemic struck Hispaniola in 1507 and is known to have wiped out entire nations there. On the North American mainland, smallpox appears to have struck in 1513 and again between 1520 and 1524, with a mortality rate estimated at 75% of those exposed. It is thus impossible to calculate the number of nations and religious traditions that existed prior to 1492.<sup>14</sup>

While the physical devastation of the epidemics generated incalculable social and religious upheaval among Native people, actual contact with Europeans was even more disruptive.<sup>15</sup> The level of violence in post-contact America was unprecedented. Disease, European weapons and warfare, the introduction of alcohol, the appropriation of native lands under color of law, and physical and cultural genocide created a climate in which traditional forms of government and belief were undermined. Physical genocide, as stated policy or accepted practice, was a significant factor in Euro-American relations with Native peoples in what is now the United States until 1911 and persists today in parts of Central and South America.<sup>16</sup>

Similarly, policies and practices aimed at cultural genocide persist to this day. While such policies are usually represented as beneficent, they are often devastating. For many traditional people, the enact-

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can population at "a conservative total" of 7,000,000, *id.* at 32, and the hemispheric population at slightly more than 72,000,000, *id.* at 25.

13. See Stannard, *supra* note 12, at 263.

14. Thornton, *supra* note 12, at 61-64. Smallpox was by no means the only such disease. *Id.* at 64.

15. For a provocative perspective on the social and religious impact of disease on indigenous people in what is now eastern Canada, see Calvin Martin, *Keepers of the Game: Indian-Animal Relationships and the Fur Trade* (1978). Martin argues that the introduction of diseases that could not be treated through traditional approaches created a spiritual crisis among Native people. In Martin's analysis, the eagerness with which eastern Canadian Indians pursued the fur trade was a consequence of this spiritual crisis and represented a kind of spiritual warfare against animals.

16. Although the massacre at Wounded Knee is generally considered the end of the era of warfare in the West, as late as 1911, a mounted group of Nevada State Police Officers "tracked down and killed a small band of 'free' (i.e., non-reservation) Shoshone" who had been accused of killing a Basque shepherd in the western part of the state. Utter, *supra* note 8, at 105. Recent incidents in Central and South America include the killing of thousands of Mayas and destruction of hundreds of their villages in Guatemala in the 1980s and '90s, the massacre of at least 70 Yanomamis by Brazilian gold miners in 1993, and the massacre of 200 Quechuas by Shining Path guerrillas in Peru, also in 1993. José Barriero, *Central and South America, in Voice of Indigenous People*, *supra* note 2, at 127-30. More recently there was a massacre of 45 Native villagers in Chiapas by paramilitary forces sympathetic to the ruling party in Mexico. Julia Preston, *Mexico Accuses Policeman of Helping Arm Mass Killers*, N.Y. Times, Jan. 13, 1998, at A8.

ment of the Indian Gaming Regulatory Act of 1988 ("IGRA")<sup>17</sup> represents a new form of cultural genocide because it encourages the subversion or co-optation of Native nations by gambling interests, often with the blessing of state governments, for the sake of "economic development." This form of economic development can enrich pro-gambling Indians at the expense of others, particularly traditional people, and may require the actual surrender of sovereignty and/or land claims.<sup>18</sup> Another cruder example of cultural genocide is the deployment of small aircraft by certain evangelical groups for the purpose of intimidating South American Indians into converting.<sup>19</sup> From the traditional perspective, missionaries have always been among the principal agents of cultural genocide.

Notwithstanding the ravages of disease, genocide, and the efforts of governments and missionaries to impose "acceptance by Indians of the values of Christianity and acquisitive capitalism," many native nations have survived.<sup>20</sup> As of 1993, there were 318 federally recognized

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17. Pub. L. No. 100-497, 102 Stat. 2467 (codified as amended at 25 U.S.C. §§ 2701-2721 (1994)).

18. The Oneida Nation of New York has a police force that is considered federal law enforcement and is deputized by Oneida and Madison county sheriff's departments. See Carole Demare, *Cops Protect a Nation Known as the Oneidas*, Times Union (Albany), June 2, 1996, at A1. The Nation has also attempted to negotiate the settlement of land claims that involve Oneidas in Canada and Wisconsin. See Oneida Indian Nation, Press Release, *Wisconsin Tribe Leaders Jeopardize Possible Land Claim Settlement*, Sept. 13, 1996 (visited Mar. 11, 1998) <<http://one-web.org/oneida/press-release/wisconsin.html>>. In addition, the controversy over gambling has led to the apparent withdrawal of the Oneida Nation of New York from the Iroquois Confederacy, a government that pre-dates European contact. See Oneida Indian Nation, Statement to the Media from the Oneida Nation Men's Council and Clan Mothers, Oct. 11, 1995 (visited Mar. 11, 1998) <<http://www.one-web.org/oneida/press-release/STATE.html>>. From the perspective of the Iroquois Confederacy, "[s]ince the Oneida Nation, as a traditional governing body, does not exist its status is held in trust by the Iroquois as a whole." Doug George-Kanentiio, *Oneida Nation: Part II*, 2 Akwesasne Notes New Series 87 (1996). In Connecticut, the Mashantucket Pequot and Mohegan nations have agreements with the State to pay fees estimated to reach \$199,000,000 in 1997, in exchange for the right to operate slot machines on their reservations, in essence agreeing to the unprecedented imposition of a state tax on an Indian nation. *Slot Machine Revenue Reported at \$48 Million*, Hartford Courant, Apr. 4, 1997, at A15, available in LEXIS, News Library, Papers File. In addition, the Pequots contributed an estimated \$465,000 to political parties and campaigns in 1996. Meredith O'Brien, *Gaming Executives Have Lot at Stake in Washington*, Hartford Courant, July 21, 1991, at B1, available in LEXIS, News Library, Papers File. Such behavior flies in the face of even the limited principles of Native sovereignty articulated by the Supreme Court in the Cherokee Nation cases and begins to reconfigure the Native nation as a corporate entity, even if the nation does start investing in cultural renewal.

19. Petru Popescu, *Amazon Beaming* 1-13 (1991) (describing these practices).

20. George E. Tinker, *Missionary Conquest: The Gospel and Native American Cultural Genocide* 109 (1993) (quoting letter Henry Benjamin Whipple, who was the Episcopal Bishop of Minneapolis and one of the leading Indian reformers of the late nineteenth century, to H.H. Montgomery, July 1, 1901, H.B. Whipple papers, Minnesota Historical Society). Tinker is Pastor of the Living Water Episcopal/Lutheran Ministry in Denver. The thrust of Tinker's book is that Christian missionaries wit-

Indian "political entities" in the United States, excluding Alaska in which an additional 197 such entities were recognized, as well as at least 200 unrecognized Indian nations in the lower 48 states and 300 unrecognized Native political entities in Alaska, about half of which are currently seeking federal recognition and at least 26 of which have recognition, and in some instances reservations, in various states.<sup>21</sup>

Although nations have survived, cultures, languages, and religions have not always fared as well. United States Indian policy during the 1950s and '60s was one aimed at forcing assimilation by, in essence, abolishing ("terminating") Indian nations and encouraging or coercing Indians to move away from reservations and relocate in urban areas. As a consequence, just 37.7% of Native Americans resided on territories characterized as Indian by the Bureau of Indian Affairs, according to the 1990 Census.<sup>22</sup>

Attempts to eradicate Native languages persisted as a matter of policy until the 1960s, except during the tenure of John Collier as Commissioner of Indian Affairs from 1934 to 1946. This policy was not formally abandoned until 1990; Federal grants for programs to preserve Native languages and to teach languages to Indian children only became available in 1992.<sup>23</sup> As a consequence, approximately 100 native languages survive in the United States today, but many of these are severely endangered, and only about 32% of contemporary Native Americans are familiar with their national languages.<sup>24</sup>

Because Native religions depend on the oral tradition for their transmission, the death of a language often means the death of a religion. Stories and ceremonies are at the core of most, if not all, Native religions, and these stories and ceremonies lose their context and meaning when translated. This connection between language and ceremony was made explicit in a communiqué written by the Traditional Circle of Indian Elders, a group that represents a number of different North American Nations: "[L]ong instruction and discipline are necessary before ceremonies and healing can be done. These procedures are always in the Native tongue; there are no exceptions . . . ."<sup>25</sup>

The right of Native Americans to practice their religions was only recognized by statute with the passage of The American Indian Reli-

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tingly or unwittingly were agents of cultural genocide. The fact that Tinker can embrace this belief and remain a Christian minister and serve as an Associate Professor of Cross Cultural Ministries at the Iliff School of Theology is but one example of the many conundra of contemporary Indian religious life.

21. Russell Thornton gave the number of federally recognized "tribes" outside of Alaska as 305 in 1986, and estimated that in 1980, one third of the self-identified Indian population of the United States were not an enrolled member of any Nation. Thornton, *supra* note 12, at 192.

22. See Utter, *supra* note 8, at 20.

23. See *id.* at 83-84.

24. Carl Waldman, *Atlas of the North American Indian* 66-67 (1985).

25. *Resolution of the 5th Annual Meeting of the Traditional Elders Circle*, Northern Cheyenne Nation, Two Moons Camp, Rosebud Creek, Montana, Oct. 5, 1980.



gious Freedom Act of 1978 ("AIRFA"),<sup>26</sup> but this right was narrowed to the point of non-existence by the Supreme Court in *Lyng v. Northwest Indian Cemetery Protective Ass'n*<sup>27</sup> and *Employment Division, Department of Human Resources v. Smith*.<sup>28</sup> In *Lyng*, the Court held that society's interest in developing land near a sacred site outweighed the religious rights of Native people, even if the development destroyed the Native religion.<sup>29</sup> In *Smith*, the Court upheld Oregon's denial of unemployment benefits to a member of the Native American Church who used peyote ceremonially.<sup>30</sup> The Court held that the ceremonial use of peyote and, by extension, other religious practices that conflicted with laws of general application were not protected by the Free Exercise clause,<sup>31</sup> notwithstanding the fact that the Federal government had long exempted Native American Church members from prosecution for the ceremonial use of the plant and regulated its distribution for ceremonial purposes.<sup>32</sup>

Both of these decisions, and *Smith* in particular, had significant implications for non-Native religions—including those Christian denominations that use sacramental wine—and an ecumenical effort to undo them led to the passage of the Religious Freedom Restoration Act of 1993 ("RFRA").<sup>33</sup> In a case emerging from a conflict between the Archdiocese of San Antonio and a Texas city over the application of historic district zoning to a church building, the Supreme Court held that Congress exceeded its power under the Enforcement Clause of the Fourteenth Amendment when it enacted RFRA, and restored the standard set forth in *Smith*.<sup>34</sup> With respect to more specifically Indigenous religious concerns, the AIRFA Amendments of 1994 were designed to redress some of the negative impacts of the Court's decision in *Lyng*. The Amendments, however, empower the U.S. Government to become involved in establishing the legitimacy of Native elders, sacred sites, and religious practices. This government involvement is not only offensive to the values of many traditional people; in some instances, it may demand the violation of religious precepts by compelling the disclosure of confidential, sacred information.

The issue of religious freedom only becomes salient within the context of domination and colonization. When the Constitution was adopted, Indians "were clearly not within the citizenry [that was] con-

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26. Pub. L. No. 95-341, 92 Stat. 469 (codified at 42 U.S.C. §§ 1996 to 1996a (1994)).

27. 485 U.S. 439 (1988).

28. 494 U.S. 872 (1990).

29. *Lyng*, 485 U.S. at 451-53.

30. *Smith*, 494 U.S. at 890.

31. *Id.*

32. *Id.* at 912 n.5 and accompanying text (Blackmun, J., dissenting).

33. Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (1994)).

34. *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997).

templated" by the framers,<sup>35</sup> or for that matter by the framers of the Thirteenth and Fourteenth Amendments. Few Indians were U.S. citizens in 1787, 1868, or even 1920. In 1919, the Wilson administration offered citizenship to all 9,000 Native American veterans of World War I, but only a small percentage accepted; U.S. citizenship was imposed on "all non-citizen Indians born within the territorial limits of the United States" with the passage of the Indian Citizenship Act of 1924 ("ICA" or "Citizenship Act").<sup>36</sup>

It seems likely that many of the act's supporters voted out of a belief they were conferring a benefit on Native Americans; however, the legislation had the effect of forcing American Indians "to live within a political/legal no man's land from which there seems to be no possibility of extrication."<sup>37</sup> To traditional people, the "granting" of citizenship to Indians was but one act in a series of governmental efforts to strip Indian nations of their land and sovereignty by legal means. These efforts gained force and grew more refined as the period of military conquest drew to a close. European and later American law, however, had been enlisted in support of efforts to expropriate Indian lands since first contact.

Many popular images of Columbus's "discovery" of Hispaniola depict the explorer and his crew planting the Spanish flag and the cross on the island's shore and "claiming" the land for Spain. Whether or not these images are historically accurate, they represent a legal principle—and a cultural mythology—that the Americas were, in essence, devoid of human inhabitants before the European arrival. Because the cultural mythology of the empty land is so strong, the legal basis for making a claim is seldom examined. The right to claim land at the moment of "discovery," without conquest or colonization, is based on a legal fiction that dehumanizes the original inhabitants. This fiction, which had its origins in medieval theology, was fully elaborated to justify the European occupation of the Americas.

In 1455, following the fall of Constantinople, Pope Nicholas V granted King Alfonso of Portugal the authority to "capture, vanquish, and subdue all Saracens and pagans whatsoever, and other enemies of Christ wheresoever placed" to put them into perpetual slavery and expropriate their lands.<sup>38</sup> The *Inter Caetera Bull*, issued by Pope Alexander VI in 1493, granted Spain all the world not already possessed

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35. Vine Deloria, Jr., *The Application of the Constitution to American Indians, in Exiled in the Land of the Free: Democracy, Indian Nations, and the U.S. Constitution* 282 (Oren R. Lyons & John C. Mohawk eds., 1992) [hereinafter *Exiled*].

36. Law of June 2, 1924, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (1994)).

37. Deloria, Jr., *supra* note 35, at 282.

38. *The Bull Romanus Pontifex* (Nicholas V.), Jan. 8, 1455, in *European Treaties Bearing on the History of the United States and Its Dependencies to 1648*, at 9, 23 (Frances Gardiner Davenport ed., 1917) [hereinafter *European Treaties*].

by Christian states.<sup>39</sup> In issuing this Bull, the Pope commanded that "the Catholic faith and the Christian religion be . . . everywhere increased . . . and that barbarous nations be overthrown and brought to the faith itself."<sup>40</sup> The Spanish took the papal directives to heart, although for the first sixty years in America they were far more concerned with conquest, expropriation, and enslavement than with spreading the gospel. The question of whether Indigenous people were fully human and therefore capable of conversion was not resolved in European minds until 1537, and Spanish policies did not change until after the 1550 debate between de las Casas and Sepulveda in Valladolid.<sup>41</sup>

While other European nations soon challenged Spain's exclusive right to control the non-Christian world, they embraced the rhetoric and the doctrine under which that right had been granted.<sup>42</sup> The Spanish method of advancing the doctrine of discovery was almost exclusively military; this approach was effective in South and Central America for a number of reasons, including climate, geography, and the existence of imperial states with pre-existing infrastructures that the Spanish were capable of appropriating. Conditions in North America differed and the blunt instrument of naked aggression was not always practical. Thus, the colonizers of North America had to develop a more complex approach to dealing with Indigenous peoples, one that included trading, purchasing land, and making treaties. While these different conditions have allowed many North American Native nations to retain pieces of their homelands, the doctrine of discovery still functions as the foundation for Euro-American land tenure in North America. It was upheld, indeed strengthened, by the U.S. Supreme Court in *Tee-Hit-Ton Indians v. United States*.<sup>43</sup> The Supreme Court, using extraordinarily racist language, firmly rejected any notion of aboriginal title, holding that in the absence of a treaty, lands occupied by the Tee-Hit-Ton band of Tlingit Indians since "time immemorial" belonged to the United States.<sup>44</sup>

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39. *The Bull Inter Caetera* (Alexander VI), in *European Treaties*, *supra* note 38, at 56, 61-63.

40. *Id.* at 61.

41. In 1537, Pope Paul III had issued a Bull, *Sublimis Deus*, acknowledging Indians as "true men" capable of being converted. John C. Mohawk, *Indians and Democracy: Noone Ever Told Us*, in *Exiled*, *supra* note 35, at 51. By that time the Spanish had conquered large sections of South and Central America. By 1550, nearly two decades had passed since the conquest of the Incas, the last of the three South and Central American empires to fall.

42. John Cabot received similar orders from Henry VII to "'conquer, occupy and possess' the lands of 'heathens and infidels.' Henry's expressed motive was simply to acquire the 'dominion, title and jurisdiction of the same.'" Francis Jennings, *The Invasion of America: Indians, Colonialism, and the Cant of Conquest* 5 (1975).

43. 348 U.S. 272 (1955).

44. "[T]he Tee-Hit-Tons were in a hunting and fishing stage of civilization, with shelters fitted to their environment, and claims to rights to use identified territory for these activities as well as the gathering of wild products of the earth. . . . [P]etitioner's

While the theory that Indigenous nations have a right to hold land through a grant from those who claim it under the doctrine of discovery is perverse, it is mitigated to some extent by the fact that the need to make treaties with Indigenous nations compelled Europeans in North America to deal with Indians as human beings and with Indian nations as sovereign entities. Thus by the seventeenth century, the doctrine of discovery "was developed as a regulatory mechanism between [sic] European sovereigns to prioritize their rights to engage in international relations with indigenous nations."<sup>45</sup> In the early years of the American republic, when Indians retained sufficient military strength to threaten the existence of the new nation, the ability of Indian nations to make treaties was deemed "as absolute as any other nation."<sup>46</sup>

This principle was breached more than it was observed before it was openly rejected. Its erosion as a matter of law began with *Fletcher v. Peck*,<sup>47</sup> which upheld the right of states to claim Indian land that had been claimed by Britain in 1763, irrespective of Native claims thereto. In *Johnson v. McIntosh*,<sup>48</sup> the Supreme Court held that the doctrine of discovery supported the United States' territorial claims; this provided the legal justification for the Indian Removal Act of 1830.<sup>49</sup> After passage of the act, in *Cherokee Nation v. Georgia*<sup>50</sup> and *Worcester v. Georgia*,<sup>51</sup> the Court articulated the doctrine that Indian nations were domestic dependent nations. Notwithstanding the holdings in the Cherokee Nation cases, the term "treaty" continued to be applied to

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use of its lands was like the use of the nomadic tribes of States Indians." *Id.* at 287-88. In a simpleminded rendition of the tangled history of Indian land claims, the Court went on to observe that "[e]very American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land." *Id.* at 289-90. The Court characterized this conquest as "the drive of civilization," and, in language strongly evocative of the terminationists, it asserted that Americans are eager "to have the Indians share the benefits of our society as citizens of this Nation." *Id.* at 281. Recovery by Indians for "wrongs" reflected the government's "grace" but not its legal liability. *Id.* at 281-82. As the Court saw it, the United States was indeed a Christian nation, not only in its right to extinguish aboriginal title but in its beneficent way of dealing with the natives.

45. Glenn T. Morris, *International Law and Politics: Toward a Right to Self-Determination for Indigenous Peoples*, in *The State of Native America*, *supra* note 4, at 55, 64.

46. *Id.* at 65 (quoting William Wirt).

47. 10 U.S. 48, 6 Cranch 87 (1810).

48. 21 U.S. 240, 8 Wheat. 543 (1823).

49. Law of May 28, 1830, ch. 148, 4 Stat. 411.

50. 30 U.S. (5 Pet.) 1 (1831).

51. 31 U.S. 350, 6 Pet. 515 (1832).

United States-Indian relations until treaty-making was abolished by Congress in 1871.<sup>52</sup>

While the end of treaty-making preceded the "closing of the frontier" by approximately twenty years, it could only take place at a time when that eventuality was easily foreseeable, and armed resistance was limited to a few, relatively isolated, die-hard nations. The years between 1871 and the passage of the Citizenship Act were marked not only by the genocidal warfare against Indians in the West that has come to symbolize the period, but also by a series of new legislative initiatives and judicial decisions that further eroded indigenous sovereignty and created new mechanisms for expropriating land.

*Ex Parte Crow Dog*<sup>53</sup> and The Major Crimes Act of 1885<sup>54</sup> extended U.S. criminal jurisdiction to Native national territories within the boundaries of the United States. In *United States v. Kagama*,<sup>55</sup> the Court expanded upon the doctrine that the United States has "plenary power" over Native nations to allow Congress to regulate Indian nations "for their own good." A year later, Congress enacted the General Allotment Act of 1887.<sup>56</sup> This statute was intended to destroy traditional systems of land tenure in which communal ownership was the norm, and it forced Indians to accept individual property ownership under Anglo-American property law. It also marked the beginning of the United States' effort to impose citizenship on Indians. In the process, it opened up 100 million acres of Indian land for expropriation.<sup>57</sup> This act also established the blood quantum as a determining factor in defining Indian identity. Mixed-blood Indians received land in fee simple but were required to become U.S. citizens, while the lands of "Full Blood Indians" were held in trust by the U.S. Government for a minimum of twenty-five years.

In the first decade of the twentieth century, the Supreme Court upheld still broader arrogations of federal power over Indian nations. In *Lone Wolf v. Hitchcock*,<sup>58</sup> the Court ruled that the plenary power doctrine gave Congress the power to abrogate sections of treaties at will for the putative benefit of Indigenous nations. In *United States v. Winans*<sup>59</sup> and *Winters v. United States*,<sup>60</sup> the Court held that native land claims and other rights took precedence over state or citizen claims.

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52. It has been argued that treaty-making continued, in substance if not in form, until 1902 because the United States continued to make "agreements" with Indian nations. Morris, *supra* note 45, at 65 (citing the opinions of William Wirt).

53. 109 U.S. 556, 559 (1883).

54. Ch. 341, 23 Stat. 385 (codified at 18 U.S.C. § 1153 (1994)).

55. 118 U.S. 375 (1886).

56. Ch. 199, 24 Stat. 388 (codified at 25 U.S.C. §§ 331-358 (1994)).

57. This figure is from Ward Churchill & Glenn T. Morris, *Key Indian Laws and Cases, in The State of Native America*, *supra* note 4, at 13, 14.

58. 187 U.S. 553 (1903).

59. 198 U.S. 371 (1905).

60. 207 U.S. 564 (1908).

In making these rulings, however, the Court reaffirmed Congress's authority to deprive Indian nations and Indian people of any such rights.

Non-Indian Americans generally consider citizenship a blessing. Efforts to extend all the rights of citizenship to excluded groups such as women and African-Americans are generally viewed as progressive steps toward making the American body politic truly inclusive. The Native perspective is radically different. For Indigenous Americans, the "right" to be citizens is the product of a centuries-long effort to deprive them of their lands, languages, religions, cultures, and political systems. With this as background, the words of a Mohawk woman that "my parents always taught us that once you vote, you stop being an Indian," should come as no surprise, nor should the fact that the Iroquois Confederacy and traditional Hopis issue and travel on their own passports, a practice that makes international travel difficult and uncertain for them.<sup>61</sup> Similarly, the existence of the Iroquois Nationals Lacrosse team, which competes with nation-states on an international level, is a powerful expression of the continuing refusal of traditional Native people to accept the citizenship that they never sought.

The period since the imposition of citizenship has been less relentlessly bleak for Native Americans to the extent that the Indian population has rebounded dramatically from the nadir that is believed to have been reached around 1900.<sup>62</sup> If the courts have been consistent in their eagerness to chip away at sovereignty in the post-citizenship period, as evidenced by *Tee-Hit-Ton* and a number of other cases, Congress has been somewhat less malevolent at times. The Indian Child Welfare Act of 1978,<sup>63</sup> recognizes that Indian children have a right to their Native identities and whatever rights and benefits are associated therewith, and that Native nations have an interest in maintaining their cultures in future generations. This statute is perhaps the lone example of the United States government acting in a way that truly advances the rights of Native Americans. The AIRFA and the Amendments thereto—and the RFRA which, it was hoped, would protect the religious rights of Native people as well as those of a much greater number of non-Natives—are somewhat more problematic. They were intended, however, to relieve traditional people from the fear of prosecution for practicing their religions.

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61. Interview with Rosemary Richmond, Executive Director, American Indian Community House, at the American Indian Community House, in New York City (Oct. 1996).

62. According to the Census Bureau, there were 237,196 Indians in the United States in 1900 and 244,437 in 1920. It is difficult to ascertain whether the slightly higher 1920 figure is the result of a more comprehensive count. Thornton, *supra* note 12, at 160 tbl.7-1.

63. Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-1963 (1994)).

Some Congressional actions have been even more ambiguous. The Indian Reorganization Act of 1934 ("IRA"),<sup>64</sup> the keystone of Franklin Roosevelt's Indian New Deal, was originally intended to support traditional governments. During the legislative process, however, it was significantly altered with the result that referenda were held on all Indian reservations for the purpose of deciding whether nations would retain traditional governments or replace them with elected tribal councils modeled on the American political system. Many traditional people expressed their opposition to reorganization by refusing to participate in the referenda. As a result, the tribal council system was established on most Indian reservations in the United States.<sup>65</sup> Unfortunately, despite Collier's good intentions, the IRA further undermined traditional forms of government and deepened the divisions between traditional and more assimilated people on many reservations, even as it sought to advance the right of self-government for Indian people. Many of these divisions persist to this day, and they have been at the root of much of the intra-Indian violence that has taken place in the past several decades.<sup>66</sup>

Immediately following World War II, public awareness of Native heroism in battle was at its peak. This moment of tolerance led to the establishment of the Indian Claims Commission ("ICC" or "Commission"). Felix Cohen, Assistant Solicitor of the Interior Department under John Collier and noted authority on Indian Law, was the primary architect of the legislation. Cohen envisioned an act that would "fashion creative solutions to the time-encrusted tribal claims."<sup>67</sup> The ICC was designed to compensate Indian nations for lands that had been taken unjustly or purchased at unconscionably low prices. Throughout the Truman and Eisenhower years, the Commission provided a public assurance that Indian claims would receive serious consideration; however, the Commission faced strict limitations on the remedies it could provide.<sup>68</sup> The ICC could pay only the fair market

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64. Ch. 576, 48 Stat. 984 (now codified at 25 U.S.C. § 461 (1994)).

65. Out of 258 recognized Native nations, 181 voted in favor of reorganization. Traditional governments continue to operate in Pueblo nations in the Southwest, among the Haudenosaunee in the Northeast and in modified form among other nations such as the Crow tribe in Montana and the Warm Springs tribes in Oregon. See Utter, *supra* note 8, at 166-67.

66. For example, the occupation of Wounded Knee in 1973 was brought about when traditional Lakota people asked members of the American Indian Movement to defend them against attacks made by members of "Guardians of the Oglala Nation" or GOONS, a terror squad employed by the tribal chairman. Jim Vander Wall, *A Warrior Caged: The Continuing Struggle of Leonard Peltier, in The State of Native America*, *supra* note 4, at 291, 292-93.

67. Edward Lazarus, *Black Hills/White Justice: The Sioux Nation Versus the United States, 1775 to the Present* 185 (1991).

68. Ward Churchill, *The Earth is Our Mother*, in *The State of Native America*, *supra* note 4, at 139, 144-45 (suggesting that the Commission was established as a public relations device by a United States newly concerned with appearances that might compromise its moral authority in its role as global power). While some might

value of the land at the time of the taking, without interest, and it could not restore land to Indians under any circumstances.<sup>69</sup> Ultimately, the Commission awarded minimal compensation. Although by 1951, over 600 cases had been docketed, in 1959 only \$17.1 million in restitution had been paid, and throughout the 1960s, the average award was approximately \$500,000.<sup>70</sup>

The Indian Claims Commission turned out to be a toothless entity; its establishment came at the end of a brief period when U.S. officials attempted to recognize and endorse Native rights, albeit in an often misguided way. By 1949, pressure increased to abolish the government's trust relationship with Indian nations. The trust relationship was generally established by treaty, but the perception that it was "socialistic," coupled with the white desire to obtain Indian lands and resources, supported the belief that the government should not:

continue in the role of trustee of the Indians' property . . . [because] protective guardianship, if pursued without regard to the welfare of the person protected, can defeat its purpose. Development of the property to full utilization and encouragement of the owner to accept responsibility for management—these are the proper goals of Indian administration.<sup>71</sup>

Dillon S. Myer, appointed Commissioner of the Bureau of Indian Affairs ("BIA" or "Bureau") by President Truman in 1950, vigorously pursued these goals and spearheaded a new drive to deprive Native Americans of their lands and their rights under the guise of freeing them from government domination.

Myer first came to prominence as the Director of the War Relocation Authority ("WRA"), the agency responsible for Japanese internment during World War II. As Commissioner of Indian Affairs he pushed for termination legislation and sought to transfer the Bureau's education, health care, and law enforcement obligations to the

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dismiss this assertion as overly cynical, the impact of America's treatment of Indians on its global image was a source of concern at the time. As Eleanor Roosevelt observed in 1949:

One of the Soviet attacks on the democracies, particularly in the United States, center [sic] on racial policies . . . . In recent months the Russians have been particularly watching our attitude towards native Indians of our country. . . . Are we indifferent to the way our Indians are treated? If not we had better let our representatives in Congress know that we do not like the present trend of legislation.

Donald L. Fixico, *Termination and Relocation: Federal Indian Policy, 1945-1960*, at 13 (1986) (citing *Indian Bureau Makes Progress*, June 30, 1949, Interior Dep't News Release, box 43, White House file, Philleo Nash Papers).

69. In one case, the Commission did recommend the restoration of 130,000 acres to the Taos Pueblo. In the end, Congress restored only 48,000 acres to the nation. Churchill, *supra* note 68, at 147.

70. Churchill, *supra* note 68, at 145, 147.

71. *Report of Commissioner of Indian Affairs John R. Nichols*, June 30, 1949, reprinted in 2 *The American Indian and the United States: A Documentary History* 975 (Wilcomb E. Washburn ed., 1973).



states.<sup>72</sup> He purged the Bureau of Roosevelt-era holdovers, replacing them with bureaucrats, many of whom had worked under him at the WRA and lacked any knowledge of Indian affairs.<sup>73</sup> He attempted to undermine the Indian Claims Commission and to deprive Indians of both territory and the right to choose their own counsel.<sup>74</sup> He supported a campaign of intimidation and red-baiting against John Collier, Felix Cohen, and other attorneys defending Indians from BIA policies and, in at least one instance, against Indians themselves.<sup>75</sup>

Myer's successor, Glenn L. Emmons, had "close ties to the western business community," and if Emmons seemed less abrasive than Myer, the substance of his policy remained the same as the Bureau developed more refined techniques to pursue the same basic objectives.<sup>76</sup> Under Emmons, Congress passed Public Law 280 in 1953,<sup>77</sup> making "prompt termination as soon as practicable" the goal of U.S. Indian policy.<sup>78</sup> By 1958, the Bureau had begun to back away from this goal, but the objective would not be completely abandoned until 1970.<sup>79</sup> In all, termination affected 109 native nations,<sup>80</sup> and as a consequence of post-New Deal Indian policy, the total loss in the native land base between 1948 and 1957 amounted to 2,595,413.66 acres, with

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72. Richard Drinnon, *Keeper of Concentration Camps: Dillon S. Myer and American Racism* 166-87 (1987).

73. Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 Yale L.J. 348, 383-84 (1953).

74. *Id.* at 371-73. Cohen died shortly after the article was published, but his discussion of Myer's interference with the ICC helps to explain the reasons for the Commission's limited effectiveness.

75. Rebecca L. Robbins, *Self-Determination and Subordination: The Past, Present, and Future of American Indian Governance*, in *The State of Native America*, *supra* note 4, at 87, 100 (quoting Myer as referring to the Oglala Lakota strategy to resist termination of the Pine Ridge Reservation as "Communist inspired"). Drinnon cites F.B.I. files on the Pine Ridge situation, including a letter from Secretary of the Interior Oscar L. Chapman that "alleges that one of the members of the tribal council is reportedly an active Communist and that Communist organizers from Denver have recently spent some time on the reservation." Drinnon, *supra* note 72, at 221. The letter further claims that Communists among other things, sponsored clothing drives for the reservation and Native American Church ceremonies at which "Indians taking part in the service became doped." *Id.* at 222. Myer and his allies did not restrict themselves to red-baiting their adversaries. Drinnon provides a thorough examination of the extent of their smear campaign, which included leaking information to columnist Drew Pearson that Felix Cohen was a member of a syndicate seeking billions of dollars in Indian claims. *Id.* at 230-31. In reference to a proposed measure to "authorize employees of the Indian Bureau to carry arms and to make arrests, searches, and seizures, without warrant, for violation of Bureau regulations, on or off Indian reservations," Cohen asserted that Myer "made several speeches and distributed thousands of circular letters charging that critics of the measure were either dishonest or dupes of dishonest agitators." Cohen, *supra* note 73, at 359-60.

76. Lazarus, *supra* note 67, at 225.

77. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588.

78. Drinnon, *supra* note 72, at 264.

79. *Id.*

80. Robbins, *supra* note 75, at 99.

more than two-thirds of the loss occurring after the passage of the Termination Act.<sup>81</sup>

Under Emmons, the Bureau of Indian Affairs also developed a policy of purportedly voluntary relocation of Indians from reservations to urban areas. The relocation program<sup>82</sup> provided funds for use on Indian reservations for the purpose of inducing Indians to move to urban areas, draining badly needed resources from education, health care, and economic development. The relocation program depended on an element of deception in its efforts to induce reservation Indians to move to urban areas. The government's promise of "Good Jobs . . . Happy Homes . . . [and] Training"<sup>83</sup> clashed with the problems of city life, including "loneliness, alcoholism, depression, police harassment, unemployment, and crime."<sup>84</sup> Nevertheless, the twin policies of termination and relocation were highly effective in the short term. Between 1957 and 1959, 35,000 Indians left reservations for urban areas,<sup>85</sup> and while the Indian population of the United States grew from 379,000 in 1945 to 508,675 in 1960, the percentage of Indians living on reservations declined by over sixteen percent.<sup>86</sup>

The destructive policies of the 1950s helped to engender a resurgence of Native resistance to Euro-American domination that has persisted to the present. In 1958, the Tuscaroras began a public and legal protest over the construction of a dam on their territory. Many other nations around the country undertook similar actions, either by resisting attempts to deprive them of territory or by actively enforcing rights, including hunting and fishing rights, that were guaranteed by treaty. By the late sixties and early seventies, many of the children of relocated Indians would return to the reservations as American Indian Movement ("AIM") activists, radicalized by their urban experience but still eager to reconnect with their traditional roots. It was also during this period that Native Americans began to look to the United Nations and the World Court as fora for asserting their rights.<sup>87</sup>

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81. *See The Indian: America's Unfinished Business: Report of the Commission on the Rights, Liberties, and Responsibilities of the American Indian* 219 tbl.3 (compiled by William A. Brophy & Sophie D. Aberle, 1966) [hereinafter *The Indian*].

82. Act of Aug. 3, 1956, ch. 930, 70 Stat. 986.

83. Bureau of Indian Affairs relocation promotion poster, *reproduced in* Peter Nabokov, *Native American Testimony: A Chronicle of Indian-White Relations from Prophecy to the Present, 1492-1992*, at 332 (1991).

84. *Id.* at 336.

85. Robbins, *supra* note 75, at 99.

86. *See The Indian, supra* note 81, at 218 tbl.2.

87. *See, e.g.,* Basic Call to Consciousness (Akwesasne Notes ed., rev. ed. 2d printing 1982). Basic Call to Consciousness, first published in 1978, is a collection of statements delivered by the Haudenosaunee at a gathering of United Nations Non-Governmental Organizations in 1977. The Conference marked the beginning of an era in which Indigenous Peoples have sought to defend their rights before international bodies. The traditional leaders of the Haudenosaunee remain at the forefront of this effort.

The Indian Civil Rights Act of 1968 ("ICRA")<sup>88</sup> formally ended tribal termination but "served to bind the forms assumed by indigenous governments even more tightly to federal preferences than had the IRA."<sup>89</sup> Like the IRA, the ICRA seems to have been a flawed but basically well-intended effort, and after it became law, Congress restored recognition to many of the nations that had been terminated. The same cannot be said for the Alaska Native Claims Settlement Act of 1971 ("ANCSA"),<sup>90</sup> in which Congress, using its plenary power, converted all Alaskan Native nations into chartered Alaska corporations, shares of which have been alienable since 1991. As a result, an estimated 44 million acres of resource rich Alaskan lands were expropriated from Native nations and opened for outside exploitation.<sup>91</sup>

The Indian Mineral Development Act of 1982 ("IMDA")<sup>92</sup> and the IGRA resemble the ANCSA, in that both encourage the subversion of traditional cultures for the sake of "economic development" along corporate and capitalist lines. The IMDA encourages IRA governments to enter into joint ventures with mining companies for the purpose of extracting the natural resources on their territories, and while this has enabled certain Indians to become wealthy, it runs counter to traditional values and represents yet another transmogrification of the land grab. The IGRA, discussed above, functions in a similar manner, and like the ANCSA, it further subverts even the "domestic dependent nations" doctrine by forcing Indian nations into direct negotiations with individual states.

In the post-citizenship era, the U.S. Supreme Court has been more consistently hostile to Indigenous Americans than either the legislative or executive branch. During the years of the Warren Court, there was little recognition of native sovereignty. Even the liberal icon Justice William Brennan endorsed the right of the U.S. Government to evict individual Indians from their land without directly compensating them.<sup>93</sup> In a series of decisions between 1978 and 1990, the Court severely curtailed the jurisdiction of Indian nations over non-Indians and non-tribal members residing on their territories by determining that zoning laws and hunting and fishing regulations did not apply to non-members and that sales taxes could be collected on reservation sales of items sold to non-members.<sup>94</sup> The Court did affirm Native

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88. Pub. L. No. 90-284, 82 Stat. 77 (codified at 25 U.S.C. §§ 1301-1341 (1994)).

89. Churchill & Morris, *supra* note 57, at 16.

90. Pub. L. No. 92-203, 85 Stat. 688 (codified at 43 U.S.C. §§ 1601-1629 (1994)).

91. Churchill & Morris, *supra* note 57, at 16.

92. Pub. L. No. 97-382, 96 Stat. 1938 (codified at 25 U.S.C. §§ 2101-2108 (1994)).

93. *United States v. Dann*, 470 U.S. 39 (1985).

94. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991) (holding that states are free to collect taxes on sales to non-tribe members); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (zoning); *Montana v. United States*, 450 U.S. 544 (1981) (holding that Native nations lacked the power to regulate non-Indian fishing and hunting on reservation land owned by nonmembers of the tribe); *Oliphant v. Suquamish Indian*

sovereignty in two areas; in a decision that mirrored the IMDA, it allowed Native nations to tax companies that extract natural resources from Indian lands.<sup>95</sup> More importantly in *Santa Clara Pueblo v. Martinez*,<sup>96</sup> the Court held that Native nations had broad sovereign immunity from suit, even from suits brought under the ICRA. Although the decision in *Santa Clara Pueblo* represents a triumph for the principle of Native sovereignty, it also means that Native people may have no recourse when their Nation's government violates their rights or acts against their interests. In at least one instance, this holding has produced a situation in which the leader of a nation has been installed by the Bureau of Indian Affairs and empowered to do as he pleases, in the absence of any clearly defined mechanism to remove him from office.<sup>97</sup>

History dictates that any traditional Native American who obtains a legal education bears a heavy burden. To some, becoming a member of the Bar and swearing to uphold the Constitution are unacceptable and tantamount to treason. Those who choose admission must work within a system that continues to be almost entirely adverse to their interests. This means that pursuing a litigation strategy to protect or advance Indigenous rights, outside the areas of family law, sovereign immunity, and the right to exploit resources in a way that generally conflicts with traditional values, is likely to fail and thereby add to the mountain of anti-Indian precedents in American law. Thus, it is often necessary to advocate for Indigenous rights in other fora and by other means, including seeking redress through international bodies, coalition-building with Indigenous peoples from around the world, public education, and political activism. The dilemmas faced by attorneys, Indian and non-Indian, who seek to respect traditional Indigenous values and defend Native rights within a hostile system may best be resolved by bearing in mind the words of the traditional Chiefs of the

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Tribe, 435 U.S. 191 (1978) (suggesting that Native nations have no jurisdiction, criminal or civil, over non-Indians residing on their territory).

95. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

96. 436 U.S. 49 (1978).

97. This is the situation in the Oneida Nation of New York. The Oneidas are recognized as having a traditional (non-IRA) government. "Chief" Raymond Halbritter was appointed as the Oneidas' representative by the Grand Council of Chiefs of the Haudenosaunee (Iroquois Confederacy), of which Oneida is a member, and the Bureau of Indian Affairs recognized him as the Nation's effective leader. In 1993, when Halbritter began to negotiate a gambling compact with New York State, the Grand Council removed him from office. The Bureau of Indian Affairs initially recognized the Confederacy's chosen replacement, but after intensive lobbying from both sides, the Bureau reversed its decision. Indian Affairs Head Reversis Recognition of Oneida Leader, N.Y. Times, Sept. 26, 1993, § 1, at 42. The controversy illustrates the ambiguity of sovereign immunity when sovereignty is circumscribed by colonialism. Prior to contact, the Haudenosaunee had developed a profoundly egalitarian and democratic form of government, and this government still operates, even after centuries in which divide and conquer tactics have been used against it.

Haudenosaunee: “[S]piritual consciousness is the highest form of politics.”<sup>98</sup>

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98. Basic Call to Consciousness, *supra* note 87, at 71.